expended in reliance upon the acquiescence of municipal officers. *City of Los Angeles v. Cohn* (1894) 101 Calif. 373, 35 Pac. 1002; see 3 Dillon, *Municipal Corporations* (5th ed. 1911) sec. 1194. This inconsistency of position has been justly criticised. *Ralston v. Weston* (1899) 46 W. Va. 544, 33 S. E. 326. New York has avoided such an anomaly. The decision in the instant case thus depended upon whether the company was authorized under the statute to erect and maintain abutments within the limits of the highway. The language of the statute perhaps implies that a railroad crossing may to some extent impair the usefulness of a highway, and if the public necessities did not require a greater width of roadway between the abutments than was left, the defendant seems to have complied with the law. *People v. N. Y., N. H. & H. Ry.* (1882) 89 N. Y. 266; see 3 Elliott, *Railroads* (3d ed. 1921) sec. 1577, note 88. The court held, however, first that the statute did not authorize the company to appropriate permanently any part of the highway for abutments; secondly, that the consent of the highway commissioners was therefore immaterial; and thirdly, that even if the abutments were lawfully erected in the first instance the duty of preserving the highway "in its former state of usefulness" is a continuous one and a railroad, therefore, must make such changes as are reasonably necessary for the increased needs of the public. Although it is perhaps rather strained to hold that under this statute a railroad's duty in regard to the character of crossing is enlarged *pari passu* with the public necessity, the result accords with that reached by other courts in interpreting similar, though more explicit, statutory or charter provisions. See 3 Elliott, *op. cit.* secs. 1579, 1580.

WASTE—AMELIORATING WASTE—EFFECT OF SHORT-TERM LEASE.—Without the consent of the plaintiff, the owner of the building, the defendant, an assignee of a lease expiring in January, 1932, made substantial alterations on the premises which enhanced the value of the property. The plaintiff sought an injunction to restrain waste and a mandatory injunction directing the defendant to restore the premises to their original condition. *Held,* that the injunctions should issue. *McDonald v. O'Hara* (1921, Sup. Ct.) 117 Misc. 517, 192 N. Y. Supp. 545.

Waste is the destruction or material alteration or deterioration of the freehold or of the improvements forming a material part thereof, by any person rightfully in possession but who has not the fee title or the full estate. Coke, *Littleton,* sec. 53a; *Bee Bldg. Co. v. Peters Trust Co.* (1921, Neb.) 183 N. W. 302. It was the rule at early common law that any material alteration of buildings on leased premises by a tenant was waste even though the value of the property was increased by the alterations. *Cole v. Green* (1682, K. B.) 1 Lev. 309. There are dicta in many modern cases to the same effect. See *Hamburger & Dreyling v. Settegast* (1910) 62 Tex. Civ. App. 446, 131 S. W. 639; *F. W. Woolworth Co. v. Nelson* (1920, Ala.) 85 So. 449. It has been held that a provision in the lease allowing the lessee to make alterations in the building did not privilege him to tear down and destroy the building even though he proposed to substitute a better one. *Davenport v. Magoon* (1884) 13 Or. 3, 4 Pac. 299. Where a life tenant began to tear down a dwelling house with the professed object of replacing it with a better building, alleging the dwelling as unfit for use, it was held that he would be restrained from so doing since, as the court said, it was beyond its province to inquire whether the tenant would ever replace it with a better, or as good a building, or any building. A further reason assigned was that it might become an impossibility for him to perform no matter how willing he might be. *Dooly v. Stringham* (1885) 4 Utah, 107, 7 Pac. 405. The removal of a valueless building by a life tenant has been held not to be an act of waste where owing to changed conditions such removal was necessary for the profitable use of the property, but it appears from the same case that a different view would be taken in the case

of a tenant holding under a short-term lease. *Melms v. Pabst Brewing Co.* (1899) 104 Wis. 7, 79 N. W. 738. In England, the House of Lords refused to grant an injunction restraining a tenant under a lease for 999 years from converting store buildings into dwelling houses, the neighborhood having changed so as to do away with any demand for store buildings. *Doherty v. Allman* (1878, H. L.) L. R. 3 App. Cas. 709. But where, as in the instant case, there has been no permanent change of conditions, or where the occupation of the premises is to be for a short term only, it seems only proper to enjoin even ameliorating waste. The lease merely gives the privilege to use the building and the landlord has the right to receive back, at the end of the term, the very thing which he has leased. *Agate v. Lowenbein* (1874) 57 N. Y. 604; *Hamburger & Dreyling v. Settegast, supra; Melms v. Pabst Brewing Co., supra.*

WILLS—EFFECT OF A LAPSE OF PART OF THE RESIDUARY ESTATE.—The testatrix directed that all the residue of her estate "including lapsed legacies" should be divided among certain legatees in specified proportions. One of the legatees died during the testatrix's lifetime. *Held,* that the legacy continued as part of the residue and should be distributed to the survivors. *Aitken v. Sharp* (1922, N. J.) 115 Atl. 912.

It is well settled that a lapse of any portion of the residuary estate itself does not inure to the benefit of the remaining residuary legatees but passes as if there had been an intestacy. Gardner, *Wills* (1903) 419; *Skrymsher v. Northcote* (1818, Ch.) 1 Swanst. 566; *Lyman v. Coolidge* (1900) 176 Mass. 7, 56 N. E. 831. This rule seems to have developed on account of a desire to effectuate the testator's unexpressed intentions. 2 Jarman, *Wills* (6th ed. 1910) 1056. The rule has been severely criticised, however, and the theory upon which it is based seems fallacious. *In re Gray's Estate* (1892) 147 Pa. 67, 23 Atl. 205; 2 Redfield, *Wills* (3d ed. 1876) 119; see *In re Dunster* [1909] 1 Ch. 103. Some courts, although advancing no reasons, do not recognize it. *Gray v. Bailey* (1873) 42 Ind. 349; *West v. West* (1883) 89 Ind. 529. And in at least one jurisdiction the rule has been changed by statute. *Woodward v. Congdon* (1912) 34 R. I. 316, 83 Atl. 433. In general it has been considerably restricted by holding it applicable only where the legatees take as tenants in common, and not as joint tenants or as members of a class. *In re Dunster, supra;* I Underhill, *Wills* (1900) sec. 336. No jurisdiction applies the rule if the testator's intention is expressed with sufficient certainty. *Swallow v. Swallow* (1896) 166 Mass. 241, 44 N. E. 132; *In re Palmer* [1893, C. A.] 3 Ch. 369. The general rule was considered in the instant case, but the court considered that the phrase "including lapsed legacies" showed the testatrix's intention that all lapsed legacies, whether in the residue or not, should continue as part of the residue and inure to the benefit of the surviving residuary legatees. Although this phrase alone is a meagre basis for an inference that the testatrix actually intended the result reached by the court's interpretation, nevertheless the decision seems sound in that it limits the application of a rule which is technical in its nature and of doubtful value.